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No. 00-001829

IN THE

Supreme Court of the United States

ADVANCED STRETCHFORMING INTERNATIONAL, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLANT WORKERS OF AMERICA (UAW), AMALGAMATED LOCAL UNION NO. 509, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

NLRB v. Burns International Security Services, 406 U.S. 272 (1972), holds that a "successor" employer generally is not confined to its predecessor's collective bargaining agreement, and has the right unilaterally to set the initial terms and conditions on which it will hire the employees of its predecessor before consulting with the employees' bargaining unit. *Burns* provides an exception to this rule that applies where it is "perfectly clear" that the new employer plans to retain all of the employees in the unit. In that circumstance, the successor should initially consult with the employees' bargaining unit before it fixes the initial terms.

The questions presented in this petition are:

1. Whether, as the Ninth Circuit held below, the NLRA requires a successor employer that commits any unfair labor practice to forfeit its *Burns* right and pay back wages and benefits under its predecessor's collective bargaining agreement, or whether, as the D.C. Circuit has held, the forfeiture doctrine applies only where the successor employer's unfair labor practice falls within the "perfectly clear" exception of *Burns*.

2. Whether, as the Second, Seventh, and Ninth Circuits have held, the NLRB has the power to require the successor employer to pay back wages under the predecessor's collective bargaining agreement for the period from the unfair labor practice until the successor reaches or would have reached a new agreement or impasse, or whether, as the Sixth and D.C. Circuits have held, the Board's power is limited to imposing the predecessor's collective bargaining agreement upon the successor employer only for a reasonable time for bargaining.

3. Whether application of the forfeiture doctrine is appropriate under any circumstances.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, petitioner states that Advanced Stretchforming International, Inc. has no affiliates, parents, or subsidiary companies. Since the inception of this case, Advanced Stretchforming International, Inc., merged with Camarillo Dynamics, Inc., from which Advanced Stretchforming International, Inc., was the surviving corporation. At the merger's completion, the corporation's name was changed to Advanced Machine & Stretchforming International, Inc. For convenience, petitioner will be referred to as "ASI."

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PETITION FOR A WRIT OF CERTIORARI

Petitioner ASI respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, denying petitioner's suggestion for rehearing *en banc*, is not reported and is reprinted in the Appendix to this Petition ("App.") at App. 101a. The amended opinion of the panel of the Ninth Circuit is reported at 233 F.3d 1176 (9th Cir. 2000), and is reprinted at App. 1a. The original opinion of the panel of the Ninth Circuit is reported at 208 F.3d 801 (9th Cir. 2000), and is reprinted at App. 25a. The opinion of the National Labor Relations Board ("NLRB" or "Board") is reported at 323 N.L.R.B. 529 (1997) and is reprinted at App. 53a. The opinion of the administrative law judge ("ALJ") is reported in the appendix of the Board's opinion at 323 N.L.R.B. 529 (1997), and is reprinted at App. 70a.

JURISDICTION

A timely petition for rehearing and suggestion for rehearing *en banc* was denied on February 7, 2001. On April 23, 2001, Justice O'Connor granted petitioner an extension up to and including June 7, 2001, to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The amended National Labor Relations Act ("NLRA") is codified at 29 U.S.C. § 158 *et seq.*, and pertinent provisions are reprinted at App. 103a.

STATEMENT OF THE CASE

The NLRA prohibits a covered employer from refusing to bargain collectively with a duly elected representative of its employees and from interfering with, restraining, or coercing its employees with respect to their exercise of the right to elect such a representative. 29 U.S.C. § 158(a). In *NLRB v. Burns International Security Services*, 406 U.S. 272 (1972), this Court held that a successor employer who hires a majority of its predecessor's workforce is obligated to recognize and negotiate with the predecessor employees' union. *Id.* at 278-79.

The *Burns* Court made clear, however, that notwithstanding any duty to bargain with the union, the successor employer is not "bound to observe the substantive terms of the collective-bargaining contract the union had negotiated with [the predecessor] and to which [the successor] had in no way agreed." *Id.* at 281-82. Rather, a successor employer remains free to set the initial terms and conditions of employment at its facility. *Id.* at 294-95. That is so even where, as in *Burns*, the successor employer has committed the unfair labor practice of unlawfully recognizing and assisting a rival union. *Id.* at 276. This right to set the initial terms and conditions of employment is known as the "*Burns* right." The *Burns* Court held that the NLRB could not retroactively enforce the predecessor's collective bargaining agreement ("CBA") against the successor, even though the successor had committed an unfair labor practice. *Id.* at 287-88.

Although it was not implicated in the case, the Court suggested one exception to the general rule that a successor employer may unilaterally set the initial terms and conditions before meeting with the union. That exception applies when "it is perfectly clear that the new employer plans to retain all of the employees in the unit." *Id.* at 294. Under this "perfectly clear" exception, as it is called, the employer still

retains the right to set the initial terms and conditions of employment. The only difference for cases falling within the perfectly clear exception is a difference of timing: "it will be appropriate to have [the employer] initially consult with the employees' bargaining representative *before* he fixes terms," *id.* at 295 (emphasis added), rather than after fixing initial terms as in *Burns*. Because the "perfectly clear" exception did not apply in *Burns*, however, the Court had no occasion to expound upon it.

Since *Burns* was decided, several courts of appeals have interpreted the Court's brief discussion of the "perfectly clear" exception. They hold – over strenuous dissents – that a successor employer that discriminates against union employees to *avoid* retaining all of the employees and thereby avoid application of the "perfectly clear" exception is subject to forfeiture of the *Burns* right and to imposition of back pay under the predecessor's CBA. *See, e.g., Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998); *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467-68 (9th Cir. 1997); *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1319-20 (7th Cir. 1991) (en banc).[1]

The courts of appeals' expanded interpretation of the "perfectly clear" doctrine has come to be known as the "forfeiture doctrine," as the successor forfeits its *Burns* rights to set the initial terms and conditions of employment. Courts adopting the forfeiture doctrine have reasoned that it restores the *status quo ante*: these courts believe that absent the discriminatory hiring, the successor employer would not have been free to set the initial terms and conditions of employment, but would have been required under *Burns* to consult with the union first. Such an obligation would have arisen because the employer would have been perfectly clear

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[1] How long a period of time the successor is required to adopt the CBA is the subject of much debate. *See* Section II *infra*.

in its intention to hire all of the predecessor employees. *See U.S. Marine Corp.*, 944 F.2d at 1320.

This case involves three important questions about a successor employer's right to set the initial terms of employment under *Burns* when the successor employer has engaged in an unfair labor practice that does not fall within the "perfectly clear" exception. The first question is whether the forfeiture doctrine developed by the courts of appeals applies when a successor employer engages in an unfair labor practice unrelated to the "perfectly clear" exception. The Ninth Circuit holds in this case that it does apply, whereas the D.C. Circuit has held that it does not apply.

The second question concerns the remedy that the Board may impose under the forfeiture doctrine. The Second, Seventh, and Ninth Circuits hold that the Board has the power to award back pay under the predecessor's CBA from the time of the unfair labor practice until a new agreement or impasse is or would have been reached. The Sixth and D.C. Circuits, however, hold that the Board's power to award back pay is limited to the period allowing for a reasonable time of bargaining.

The third question is whether the forfeiture doctrine is ever appropriate, even in light of the perfectly clear exception. While several courts of appeals have accepted the doctrine over strenuous dissents, this Court has never addressed that question.

A. Factual Background.

The ALJ made the following findings of fact, which ASI does not challenge for purposes of this petition:

Aero Stretch ("Aero") owned and operated a metal stretchforming and fabrication facility in Gardena, California until November 30, 1992. App. 72a. UAW represented Aero's production and maintenance employees, and Aero

had entered into a CBA with UAW ("Aero's CBA") effective August 19, 1991, through August 19, 1994. App. 72a.

In June 1992, Aero filed for bankruptcy and unilaterally stopped complying with several terms of its CBA. App. 72a. Aero also failed to implement pay raises and assigned work without regard for the job classifications established in its CBA. App. 73a. UAW never filed a grievance or unfair labor practice charge regarding Aero's unilateral changes. App. 73a.

On November 19, 1992, the United States Bankruptcy Court conducted a judicial sale of Aero, calling for bids. App. 73a. Steven Brown, a local entrepreneur, submitted the highest bid. App. 73a. The judge approved the sale of assets, but imposed several conditions, including a requirement that Aero terminate all of its employees on or before November 30, 1992. App. 73a. In the meantime, Brown formed ASI Corporation and continued with Aero's work in progress, using a skeleton crew. App. 73a-74a.

On November 30, 1992, Aero's workers were called together and informed that their employment was terminated. App. 78a. Aero's Director of Operations, Eric Cunningham, informed the employees that if they were interested in interviewing for a position with the new company, ASI, they should return to the facility the following morning. App. 78a. Cunningham also told the workers that (1) the new company would hire only some of Aero's former employees, and (2) the employees hired by the new company would all start with no seniority from their employment with Aero. App. 78a, 81a. Cunningham further stated that there would be "no union" at ASI. App. 77a, 83a.

Cunningham returned to the plant on December 1, 1992, and was the first applicant interviewed by Brown for employment with the new company. App. 79a. At Brown's

request, Cunningham signed an acknowledgment of the terms and conditions of employment being offered and was hired as ASI's General Manager. Cunningham then assisted Brown in interviewing and hiring some of the former Aero employees who came to the facility that day. App. 79a.

During the interviews, each applicant was informed of the new terms and conditions of employment offered by ASI and signed the following acknowledgment:

> I UNDERSTAND THAT I WILL BE WORKING UNDER NEW TERMS AND CONDITIONS WHICH IS NOT A CONTRACT AND IS SUBJECT TO CHANGE. NEW COMPANY IS NOT ASSUMING COLLECTIVE BARGAINING AGREEMENT. YOU MAY BE EMPLOYED BY NEW COMPANY ON AN AT WILL BASIS. DETAILED LIST OF TERMS AND CONDITIONS IS TO FOLLOW.

App. 74a, 79a, 81a-82a. The applicants were informed that ASI's benefits would be similar to those offered to Cunningham and inferior to those under Aero's CBA (*i.e.*, different wages, no 401(k) plan, less vacation, fewer holidays, no medical or dental benefits, and at-will employment). App. 79a.

During the December 1, 1992, interviews, ASI hired eight production and maintenance employees. App. 79a. Aero had employed seventeen such employees on November 30, 1992, having already laid off many of its workers. App. 72a. Four of the workers were employed at the same hourly rate they had earned with Aero, two received wage increases, and two had their wages reduced. App. 79a. The ALJ later found that ASI's initial terms and conditions were inferior to those offered by Aero, including less vacation time, fewer paid holidays, and no medical or dental benefits. App. 79a.

In early December 1992, after ASI had hired its initial contingent of workers and established the terms and conditions of employment, UAW sent several letters to Brown demanding recognition. App. 74a. On December 14, 1992, ASI refused to recognize UAW based on evidence that it lacked the workers' support. App. 74a, 86a.

In an opinion dated November 18, 1994, the ALJ concluded that ASI had committed an unfair labor practice. The ALJ determined that the "no union" statement at Aero's closing by Cunningham, the former Aero employee, precluded ASI's reliance on evidence that UAW lacked the workers' support. App. 90a. Therefore, the ALJ held that ASI did not have a good faith belief that UAW lacked majority support, so ASI should have recognized UAW as its employees' bargaining representative. App. 89a-90a. The ALJ ordered a remedy of cease and desist, posting, and a bargaining order. App. 92a-94a.

On April 25, 1997, the Board adopted the ALJ's recommended order in part, but also determined that ASI had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. § 158, by failing to adopt the substantive terms of Aero's CBA. The Board did not base its holding that ASI was required to adopt the CBA on a conclusion that it was "perfectly clear" that ASI intended to retain all of Aero's employees. Instead, the Board understood the forfeiture doctrine to be an "equitable doctrine," and thus concluded that ASI had "forfeited" its *Burns* right to set the initial terms and conditions of employment altogether by committing the unfair labor practice of stating there would be "no union." App. 57a-59a. The Board ordered a remedy of cease and desist, posting, bargaining order, and back pay according to the predecessor's CBA until ASI bargained to a new agreement or reached impasse. App. 60a-63a.

B. The Original Ninth Circuit Panel Decision.

On September 17, 1997, the Board applied to the United States Court of Appeals for the Ninth Circuit to have its order enforced. On April 4, 2000, a panel of the Ninth Circuit (Judges Boochever and Tashima; Judge O'Scannlain, dissenting) granted in part the Board's Petition for Enforcement. App. 25a. The panel majority, however, did not rely upon the Board's "equitable" interpretation of the forfeiture doctrine in reaching this conclusion. Rather, it determined that ASI violated the Act by setting the initial terms and conditions because ASI had made it "perfectly clear" that it planned on hiring all of the employees of its predecessor, and thus was subject to the "perfectly clear" exception. App. 35a.

C. The Amended Ninth Circuit Panel Decision.

1. Following issuance of the panel majority's decision, both ASI and the Board timely filed petitions for rehearing and rehearing *en banc*. ASI argued in its petition that the Court should enforce or deny the Board's order based on the forfeiture doctrine, noting that the Board had expressly declined to make any finding at all that it was clear – perfectly or otherwise – that ASI intended to hire all of Aero's employees. App. 105a.

In response to the petitions, the panel majority filed an amended opinion on November 22, 2000. App. 1a. The amended opinion again enforced the Board's order in part, this time by adopting the Board's "equitable forfeiture" doctrine. The panel majority began by holding that "'it would be contrary to statutory policy to confer *Burns* rights on an employer that has not conducted itself like a lawful *Burns* successor.'" App. 8a (quoting App. 58a). The panel majority recognized that the forfeiture doctrine previously had been applied only "in instances where an employer seeks to avoid [the 'perfectly clear' exception] by strategically

refusing to hire its predecessor's employees based on their union membership." App. 8a. The panel majority acknowledged that this case did not concern the *Burns* "perfectly clear" exception – the genesis of the forfeiture doctrine in the courts of appeals – because the Board expressly did not rely on that exception. App. 9a.

According to the panel majority, "the question before us is whether ASI's 'no union' statement 'blocked the process by which the obligations of a successor are incurred' in a manner similar to the discriminatory hiring practices to which the forfeiture doctrine previously has been applied." App. 9a (quoting App. 58a). The panel majority concluded that it did, for the "no union" statement likely caused the predecessor's workers to believe "that employment with ASI was contingent on abstaining from union representation, including insistence on the right to bargain before ASI imposed initial terms." App. 10a. Thus, "[i]t was not unreasonable for the Board to conclude, as a practical matter, that the 'no union' statement blocked the process by which ASI's obligations as a successor were incurred." App. 10a. Accordingly, ASI forfeited its *Burns* right to establish the initial terms and conditions of employment. App. 7a, 10a.

The panel majority then set out to determine what the proper remedy should be. According to the panel, normally the Board may award back pay for a "reasonable time of bargaining," and not the period from when the successor takes over the business until a new agreement or impasse is actually reached. App. 10a. However, the panel believed that "the limitation on the period for which back pay may be awarded applies, however, only when it is clear that the successor 'lawfully would not have agreed to the wage scale provided by the predecessor's labor agreement, and the resulting impasse would have resulted in reduced wages.'" App. 10a-11a (quoting *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467 (9th Cir. 1997)). Any uncertainty on

this question should be resolved against the employer, the panel majority concluded, for "a successor should not benefit from any ambiguity that results from its own wrongdoing." App. 11a. The panel majority remanded to the Board the question whether ASI lawfully would have refused to adopt the predecessor's labor agreement. App. 13a. If ASI failed to establish that it lawfully would have refused to adopt Aero's CBA, the Board had the power to require ASI to pay back wages under Aero's CBA from the time of the "no union" statement until a new agreement or impasse would have been reached. App. 11a-13a.

2. In his dissent, Judge O'Scannlain began by noting that this Court has held that "when a new employer acquires a business, it is free, generally, to set the initial terms and conditions of employment, and is not bound by its predecessor's CBA." App. 15a. Citing the D.C. Circuit's decision in *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998), Judge O'Scannlain explained that the forfeiture doctrine is a "corollary" to the "perfectly clear" exception of *Burns*, and thus is limited to those situations where the "perfectly clear" exception comes into play, *i.e.*, where an employer attempts to avoid the "perfectly clear" exception by discriminating against and not hiring the predecessor's union employees. App. 18a-19a. Here, however, the panel majority applied the forfeiture doctrine to a successor employer who committed an unfair labor practice – the "no union" announcement – that had nothing to do with any desire to avoid the "perfectly clear" exception through discriminatory hiring practices. App. 19a.

According to the dissent, not only was the panel majority's extension of the forfeiture doctrine both unprecedented and unwarranted, but it also conflicted with the clear dictate of *Burns*. Judge O'Scannlain explained that the successor employer in *Burns* had committed an unfair labor practice similar to the "no union" violation in this case

by assisting a new union against the predecessor union. Despite this unfair labor practice, Judge O'Scannlain noted that this Court held that the successor retained the right to set the initial terms and conditions of employment. App. 23a (citing *Burns*, 406 U.S. at 294). Judge O'Scannlain concluded:

> [B]ecause the rationale underlying the forfeiture doctrine is inapplicable to this case, the discriminatory hiring cases provide absolutely no authority for the [panel majority's] argument that ASI should be held to have forfeited its right to set initial hiring terms. The remedy that the Board misapplied in this case is one specifically designed to redress an employer's violation of the obligation created by the "perfectly clear" exception, nothing more.

App. 21a. According to Judge O'Scannlain, the proper remedy for the "no union" statement was "an order directing ASI to cease and desist telling potential applicants that ASI intends to operate with no union," not forfeiture of ASI's *Burns* right. App. 24a.

On February 7, 2001, the Ninth Circuit, over Judge O'Scannlain's vote, denied ASI's request for a rehearing and suggestion for rehearing en banc. App. 101a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case raises fundamental questions about the *Burns* right of a successor employer and the correct remedy for a successor's commission of an unfair labor practice. It also concerns the forfeiture doctrine, a controversial "remedy" that the Board invented and that several courts of appeals have accepted over vigorous dissents.

1. The Ninth Circuit's holding that the forfeiture doctrine applies to *any* unfair labor practice committed by a successor squarely conflicts with a ruling of the D.C. Circuit that holds the forfeiture doctrine is strictly limited to the "perfectly clear" exception of *Burns*. Moreover, the Ninth Circuit's decision is clearly wrong under *Burns*, in which the successor committed an unfair labor practice very similar to the one in this case but did not forfeit its right to set the initial terms and conditions of employment. The Ninth Circuit's expansion of the forfeiture doctrine outside the "perfectly clear" exception transforms what is at least ostensibly a remedial means of restoring the status quo into an equitable hammer that the Board can wield to punish successors who commit unfair labor practices unrelated to the "perfectly clear" exception. In addition to the conflict that the opinion creates, the practical effects that flow from the Ninth Circuit's decision necessitate this Court's intervention.

2. The Ninth Circuit's decision concerning the extent of the Board's "remedial" powers also deepens an existing split among the courts of appeals. The Second, Seventh, and Ninth Circuits hold that, pursuant to the forfeiture doctrine, the Board has the power to award back pay under the predecessor's CBA from the time of the unfair labor practice until a new agreement or impasse is or would have been reached. The Sixth and D.C. Circuits, however, believe that the Board's power to award back pay is limited to the period allowing for a reasonable time of bargaining. As the D.C. Circuit has explained in detail, the more limited "reasonable time of bargaining" rule comports with this Court's precedent holding that the Board's powers are remedial, not punitive. Permitting the "punitive" approach of the Second, Seventh, and Ninth Circuits to proceed unchecked not only leaves the courts of appeals in conflict, but also turns what is supposed to be a remedy for employees into a windfall. The financial difference between these approaches is enormous,

and can determine whether a successor employer will try to save a failing company (and the jobs of its employees), or simply liquidate the company and sell off its assets.

3. This case also presents the Court with the opportunity to review, for the first time, whether the forfeiture doctrine is appropriate under any circumstances. The forfeiture doctrine has continually puzzled the courts of appeals since this Court's decision in *Burns* almost 30 years ago. Several respected appellate court judges, including Judges Easterbrook and Posner, have concluded that the doctrine is inappropriate no matter what the unfair labor practice may be, even when the employer is trying to evade the "perfectly clear" exception through discriminatory hiring. Considering how divisive the doctrine has been among the courts of appeals, this case presents an excellent vehicle for this Court to examine whether the forfeiture doctrine has any validity, and if so, how the doctrine should operate.

I. THE NINTH CIRCUIT'S HOLDING THAT A SUCCESSOR EMPLOYER FORFEITS ITS *BURNS* RIGHT BY COMMITTING ANY UNFAIR LABOR PRACTICE CONFLICTS WITH THIS COURT'S OPINION IN *BURNS* AND CREATES A SPLIT OF AUTHORITY WITH THE D.C. CIRCUIT.

Under fundamental principles of contract law, a party becomes bound to a contract by voluntarily agreeing to the terms in exchange for consideration from the other party. *See* Restatement (Second) of Contracts §§ 18, 24 (1979); *see also Burns*, 406 U.S. at 287. With this case, the Ninth Circuit has dramatically departed from this elemental premise. Employers within the Ninth Circuit now may find themselves retroactively bound to contracts with terms that they have never discussed or even seen. In fact, the term "collective bargaining *agreement*" has become a misnomer, because an employer may find itself subject to binding

obligations with which it has never agreed. Such a fundamental departure from the paradigm of traditional contract law is directly contrary to the holdings of this Court and the D.C. Circuit, and merits immediate reversal.

A. The Ninth Circuit's Holding Conflicts With This Court's Opinion In *Burns*, Which Held That A Successor Employer May Unilaterally Set Initial Terms of Employment Even If It Committed An Unfair Labor Practice.

This Court addressed the privileges and obligations of a successor employer in *Burns*.[2] The Court held that when a new employer takes over a business, it must recognize and bargain with the union that represented the predecessor's employees if a majority of the new employer's work force is comprised of the predecessor's employees. *Burns*, 406 U.S. at 284. But, the Court also held that, notwithstanding any duty to bargain, a successor employer is generally free to set the initial terms and conditions of employment and is not bound by its predecessor's CBA. *Id.*

In *Burns*, the successor employer not only refused to recognize and bargain with the incumbent union in violation of Sections 8(a)(1) and (5), but also unlawfully assisted a rival union in violation of Section 8(a)(2). *See Burns*, 406 U.S. at 274-77. The Board argued that the importance of stable labor relations outweighed the traditional principles of contract law, and that therefore Burns, the successor employer, should be bound to its predecessor's CBA. *Id.* This Court disagreed, reasoning that Congress did not intend that "the bargaining freedom of employers and unions [be] totally subordinate" to the goal of "stable labor relations."

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[2] The Court has explained that the appropriate test to determine whether an employer is a successor is whether substantial continuity exists between the two employers. *See Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43-44 (1987).

Id. at 287. Neither the employer nor the union should be required to "make any concessions as a result of Government compulsion," and both "*are free from having contract provisions imposed upon them against their will.*" *Id.* at 287 (emphasis added). The Court then explained that Burns had not indicated any intention to assume the predecessor's CBA, and that the Board's attempt to compel such agreement violated "the fundamental premise on which the Act is based." *Id.* The Court therefore determined that a CBA is binding upon a party only if it voluntarily consents to be bound.

The Court in *Burns* noted a single exception, commonly called the "perfectly clear" exception, to the general rule that a successor employer may set the initial terms and conditions of employment without first consulting with the bargaining unit: "Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is *perfectly clear* that the new employer plans to retain all of the employees in the unit." *Id.* at 272 (emphasis added). In that case, "it will be appropriate to have [the successor] consult with the employees' bargaining representative before [the successor] fixes terms." *Id.*

As explained *infra*, the Board and several courts of appeals have dramatically expanded upon the Court's "perfectly clear" language in *Burns* to create the forfeiture doctrine. These courts have misunderstood the *Burns* right and the relevance of the "perfectly clear" exception. This Court in *Burns* explicitly held that even under the "perfectly clear" exception where a successor retains all of the employees of the predecessor, the successor is still entitled to set the initial terms and conditions of employment. All the "perfectly clear" exception does is require the successor to "consult with the employees' bargaining representative before [the successor] fixes terms." *Id.* Under no

circumstances must the successor employee adopt the predecessor's CBA, even if the "perfectly clear" exception applies. Therefore, the forfeiture doctrine, which supposedly returns the situation to the *status quo ante*, actually does far more: it penalizes a successor for its unfair labor practice. If the employer had complied with the "perfectly clear" exception, its only duty under *Burns* would have been to consult with the union before fixing the initial terms and conditions of employment, nothing more. *See id.; U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1329 (7th Cir. 1991) (Easterbrook, J., dissenting) (rejecting the forfeiture doctrine because "an obligation to 'consult' does not imply an obligation to use the old terms unless the union agrees to different ones.'").

But even assuming *arguendo* that application of the forfeiture doctrine is ever appropriate, perhaps what is most startling about the Ninth Circuit's expansion of the forfeiture doctrine outside of the "perfectly clear" exception is that it completely ignores the Court's treatment of this precise issue in *Burns*. In *Burns*, the successor employer committed an unfair labor practice strikingly similar to ASI's by refusing to negotiate with the predecessor's union and instead negotiating exclusively with a different union – a "this union" unfair labor practice instead of the "no union" unfair labor practice in this case. *Burns*, 406 U.S. at 276. Yet instead of holding that the successor forfeited this important right, the Supreme Court ruled that the successor *retained* the right. *Id.* at 294; *see also Capital Cleaning*, 147 F.3d at 1008. Under the Ninth Circuit's severance of the forfeiture doctrine from its basis in the "perfectly clear" exception, the successor in *Burns* would have lost its right to set the initial terms and conditions because it did not "conduct[] itself like a lawful *Burns* successor." App. 8a.

The Ninth Circuit never offers a principled distinction between the "this union" unfair labor practice in *Burns* and

the "no union" unfair labor practice in this case. As in *Burns*, no nexus exists between ASI's "no union" unfair labor practice and a forfeiture of its *Burns* right. If ASI had not made its "no union" statement, it still would not have been subject to the "perfectly clear" exception in *Burns*, and it would have been legally entitled to set the initial terms and conditions of employment. *See Burns*, 407 U.S. at 284; *Capital Cleaning*, 147 F.3d at 1008. Application of the forfeiture doctrine in ASI's case does not even arguably restore the situation to the *status quo ante*, the basis on which the courts have justified the forfeiture doctrine as a corollary to the "perfectly clear" exception. *See U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1320 (7th Cir. 1991); *Capital Cleaning*, 147 F.3d at 1008. This clear evasion of *Burns* warrants the Court's immediate attention and correction.

B. The Ninth Circuit's Holding Creates A Split With The D.C. Circuit's Opinion In *Capital Cleaning*, Which Held That The Forfeiture Doctrine Is A "Corollary" To The Perfectly Clear Exception And Does Not Apply To Other Types Of Unfair Labor Practices.

The forfeiture doctrine originated in the courts of appeals as a corollary to the *Burns* perfectly clear exception. *See, e.g., Capital Cleaning*, 147 F.3d at 1008. As discussed *supra* at 3-4, in applying this exception, some courts of appeals have concluded that where a successor employer attempts to avoid the "perfectly clear" exception by discriminatorily refusing to hire predecessor employees, that employer forfeits its right unilaterally to set the initial terms and conditions of employment. *See, e.g., id. See also Kallman v. NLRB*, 640 F.2d 1094, 1102-03 (9th Cir. 1981); *U.S. Marine Corp.*, 944 F.2d at 1320-21.

But the Ninth Circuit has drastically expanded the forfeiture doctrine by applying it to all circumstances in

which an employer commits an unfair labor practice, rather than only those implicating the "perfectly clear" exception. The Ninth Circuit adopted the Board's view that the forfeiture doctrine was equitable in nature, so a successor employer that commits an unfair labor practice during the transition process is not a "lawful *Burns* successor" and, therefore, forfeits its *Burns* right. App. 8a.

According to the Ninth Circuit, such freedom is "conferred" only upon a "deserving" employer who has avoided unfair labor practices: "the *Burns* right to set initial terms and conditions of employment must be understood in the context of a successor employer that will recognize the affected unit employees' collective-bargaining representative and enter into good-faith negotiations with that union about those terms and conditions." App. 8a. In other words, according to the Ninth Circuit, a successor employer who commits *any* unfair labor practice during the transition process forfeits its *Burns* right and must, against its will, abide by its predecessor's CBA. App. 10a.

This holding directly conflicts with the D.C. Circuit's understanding of *Burns* and the forfeiture doctrine. In *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999 (D.C. Cir. 1998), the successor employer refused to hire the predecessor's workers who belonged to a union. *Id.* at 1008. Because the successor employer's actions qualified for the "perfectly clear" exception, the D.C. Circuit applied the forfeiture doctrine. *Id.* at 1008-09.

However, the D.C. Circuit also made clear that the forfeiture doctrine is a "corollary" to the "perfectly clear" exception – it does not apply to all unfair labor practices, but only to those practices that implicate the "perfectly clear" exception. The D.C. Circuit recognized that the "this union" unfair labor practice in *Burns* – favoring one union over another and failing to bargain with the predecessor union – was not the unfair labor practice of "refusing to hire a

majority of union employees." *Id.* at 1008. "For that unfair labor practice," a non-"perfectly clear" violation, "*the proper remedy was a bargaining order*," not a forfeiture of the *Burns* right. *Id.* (emphasis added).

It is impossible to reconcile the D.C. Circuit's decision in *Capital Cleaning* with the Ninth Circuit's holding in this case. Under *Capital Cleaning*, ASI would have retained its *Burns* right because its "no union" unfair labor violation has nothing to do with the "perfectly clear" exception of *Burns*. *See id.* However, because this litigation was filed in the Ninth Circuit, ASI lost its *Burns* right and is now forced to endure a CBA that it never negotiated, much less accepted.

Rather than treating the forfeiture doctrine as a corollary to the "perfectly clear" exception, as the D.C. Circuit does, the Ninth Circuit, like the Board, wields the doctrine as a hammer to punish any unfair labor practice that a successor employer commits by imposing potentially enormous retroactive liabilities on successor employers. In essence, the Ninth Circuit now requires a successor employer to earn its *Burns* rights, and nothing in *Burns* even remotely suggests this is correct. Considering the size of the Ninth Circuit, with thousands of successor employers, as well as the importance of the D.C. Circuit in Board litigation, this clear split of authority cannot go unresolved. Section 10(f) of the NLRA permits an employer to file a petition to set aside a Board's order either in the circuit of the dispute or in the D.C. Circuit. 29 U.S.C. § 160(f). It is safe to say that unless this Court grants certiorari in this case, successor employers always will choose the D.C. Circuit, rather than the Ninth Circuit, when petitioning to set aside a Board's order involving *Burns* rights.

What would restore the situation to the *status quo ante* is the remedy that Judge O'Scannlain thought was appropriate: barring ASI from telling applicants that ASI plans to operate without a union. App. 24a. Applying the forfeiture doctrine

in this case constitutes a penalty by putting ASI in a worse position than it would have been absent its unfair labor practice. *Id.*

II. THE COURTS OF APPEALS ARE SPLIT OVER THE PROPER REMEDY UNDER THE FORFEITURE DOCTRINE.

In addition to the conflict over the substantive scope of the forfeiture doctrine, this case implicates an even broader conflict over the remedial power of the Board to award back pay under the forfeiture doctrine. When an employer forfeits its *Burns* rights and must pay the predecessor's employees under the terms of the predecessor's CBA, some courts of appeals, including the Second, Seventh, and Ninth Circuits, hold that the Board has the power to award back pay according to the terms of the prior CBA for the entire period from the date of the unfair labor practice until the successor employer reaches or would have reached a new agreement or an impasse with the predecessor's employees. *See NLRB v. Staten Island Hotel Ltd. Partnership*, 101 F.3d 858, 861-62 (2d Cir. 1996); *U.S. Marine Corp.*, 944 F.2d at 1319-24; *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1467-69 (9th Cir. 1997); App. 10a-11a.

Other courts of appeals, namely the Sixth and D.C. Circuits, conclude that the Board's remedial powers to award back pay under the CBA are limited to a period of a "reasonable time of bargaining," and do not cover the entire period between the unfair labor practice and impasse or new agreement with the predecessor's employees. *See Armco, Inc. v. NLRB*, 832 F.2d 357, 365 (6th Cir. 1987); *Capital Cleaning*, 147 F.3d at 1011 ("We recognize that our view of the limitation [the NLRA] places upon the remedial authority of the Board in this type of case conflicts with that of several other circuits.").

This disagreement is more than a semantic one. It goes to the heart of the Board's power to fashion "remedies," not penalties. As this Court stated in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), "a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Id.* at 900. A "remedy" that requires an employer to pay a predecessor's employees for all back wages from the time of the unfair labor practice until impasse or agreement requires the employer to pay wages and benefits that it never would have agreed to pay. The "reasonable time of bargaining" standard "focuses the Board's efforts upon the only proper remedial goal, namely, placing the employees in the situation they would have enjoyed but for [the successor's] having unlawfully refused to hire them." *Capital Cleaning*, 147 F.3d at 1011. A broader "remedial" power, the view adopted by the Second, Seventh, and Ninth Circuits, penalizes the successor employer. This the Board cannot do. *See id.* at 1012; *see also U.S. Marine Corp.*, 944 F.2d at 1331 (Easterbrook, J., dissenting) ("None of this is remedial, and as a penalty it is not only too high but also interferes with the future operation of the plant.").

Moreover, disputes between successor employers and the predecessor employees' union often take years to resolve. The difference between a "reasonable time of bargaining" and the interval between the unfair labor practice and impasse or new agreement may amount to *years*, and thus millions of dollars. In this case, for example, the controversy began nine years ago. Thus, even if the forfeiture doctrine applies to all successor unfair labor practices, this Court should clarify the remedial powers of the Board and resolve the split among the courts of appeals, especially considering the D.C. Circuit's important role in NLRB litigation.

III. THE COURTS OF APPEALS ARE CONFUSED ABOUT WHETHER THE FORFEITURE DOCTRINE IS EVER APPROPRIATE.

The courts of appeals created the forfeiture doctrine to remedy situations where the *Burns* "perfectly clear" exception applies. *See supra* at 3-4. However, this Court has neither endorsed nor ratified such a remedy, and any straightforward reading of *Burns* reveals that the doctrine has no basis. This case presents the Court with an excellent vehicle to examine, for the first time, whether the forfeiture doctrine is ever an appropriate remedy for a successor's unfair labor practice.

As discussed *supra* at 14-16, this Court in *Burns* stated that when the "perfectly clear" exception applies, the successor merely has the duty to consult with the union. It is not required to adopt the predecessor's CBA. Therefore, requiring the successor to forfeit its *Burns* rights and to adopt the predecessor's CBA when the successor tries to avoid the "perfectly clear" exception does not return the situation to the *status quo ante*. Rather, it penalizes the successor for committing the unfair labor practice, a result consistent with the Board's "equitable" understanding of the forfeiture doctrine but inconsistent with this Court's interpretation of the Board's authority. Nothing in *Burns* supports the forfeiture doctrine; to the contrary, the Court squarely rejected its application in that case, which featured a "this union" violation remarkably similar to the "no union" violation in this case. *See Burns*, 406 U.S. at 284-87; *see also id.* at 281-82 ("It does not follow . . . from [the successor's] duty to bargain that it was bound to observe the substantive terms of the [CBA] the union had negotiated with [the predecessor] and to which [the successor] in no way agreed.").

Largely for this reason, several respected appellate judges have rejected the doctrine as a remedy for *any* unfair

labor practice, even as a corollary to the *Burns* "perfectly clear" exception. Judge Easterbrook, for example, noted that the Board lacks the power to penalize an employer for an unfair labor violation, *id.* at 1327 (citing *Sure-Tan,* 467 U.S. at 900-01), and reasoned that "[w]hat the Board characterizes as a 'forfeiture' of the successor employer's privilege to set its own terms and conditions of employment is a penalty by another name—and not a much different name at that." *U.S. Marine Corp.*, 944 F.2d at 1328 (Easterbrook, J., joined by Posner, Coffey, Manion & Kanne, JJ., dissenting); *see also* App. 14a (O'Scannlain, J., dissenting) ("By arming the Board with an unauthorized power to punish, the majority has impermissibly upset the balance of power between management and labor that Congress established in the Act.").

The proper remedy for evading a duty to bargain with the union is a bargaining order. *See U.S. Marine Corp.*, 944 F.2d at 1330 (Easterbrook, J., dissenting). The fact that the obligation to consult arises prior to setting terms rather than after setting terms does not justify the drastic remedy of the forfeiture doctrine, even under the "perfectly clear" exception. Until this Court examines the viability of the forfeiture doctrine, this confusion among the courts of appeals will continue to grow. This case presents an excellent vehicle for the Court to examine the forfeiture doctrine and end this confusion.

IV. THE PRACTICAL EFFECTS OF THE NINTH CIRCUIT'S DECISION MANDATE THIS COURT'S IMMEDIATE ATTENTION.

The ramifications of the Ninth Circuit's decision in this matter cannot be overstated. By ruling that a successor employer may be bound to a CBA that it never voluntarily assumed, the Ninth Circuit has created a significant obstacle to any effort to revitalize a failing or failed business. As this

Court explained in *Burns*: "A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital." 406 U.S. at 287-88; *see also U.S. Marine Corp.*, 944 F.2d at 1328 (Easterbrook, J., dissenting) ("Change [in the terms of employment] may be the only alternative to consigning the plant to the scrap heap. Denying the successor the right to establish its own wages and other terms whenever it is likely to hire substantially all of the predecessor's workers could prevent this process from occurring and lead to liquidation rather than revivification.").

Unions often file charges of unfair labor practices, and a successor employer cannot predict the outcome of such a proceeding with any certainty. Even the most diligent employer makes mistakes, and no employer can ensure that no unlawful labor practices will occur. Litigating whether an unfair labor practice has occurred can take years, and often boils down to a single fact or credibility determination.

This case is an excellent example of this uncertainty, where ASI was held to have committed an unfair labor practice due to a statement by an Aero employee, Cunningham. Almost 10 years have passed between Mr. Brown's decision to purchase Aero's assets and the Ninth Circuit's decision to require ASI to adopt Aero's CBA. When Mr. Brown agreed to purchase Aero's assets, the predecessor employer already had stopped honoring the terms of the CBA. Mr. Brown purchased Aero's assets with the understanding that to save the company, he needed to scrap Aero's business model, including its CBA, and start from scratch to build a new, healthy company. Now that

very same CBA has been foisted on ASI, the company that Mr. Brown formed to avoid Aero's business mistakes.

This risk of learning after years of litigation that the successor is retroactively bound to an earlier CBA that it never negotiated or accepted will likely force a successor either to (i) involuntarily adopt the predecessor CBA as the prudent course of action, or (ii) determine that the risk is too great to invest in the failing business. The former violates the fundamental principles of contract law; the latter runs contrary to national policy and hurts employers and workers alike. As Judge Easterbrook has described, the forfeiture doctrine "increase[s] the risks of taking over foundering firms, and frustrate[s] the revival of aging plants. Neither American workers nor American consumers will welcome this consequence." *U.S. Marine Corp.*, 944 F.2d at 1331 (Easterbrook, J., dissenting). Application of the forfeiture doctrine in this case is especially unfair. A statement of an employee of a predecessor that had abandoned the CBA now requires the successor to honor that same abandoned CBA, even though the successor agreed to buy the company only if it could be free from the predecessor's CBA.

The Ninth Circuit's decision in this case directly conflicts with this Court's decision in *Burns* and the D.C. Circuit's decision in *Capital Cleaning*. The opinion also deepens an existing split concerning the Board's remedial power. It provides an enormous disincentive for successor employers to purchase and attempt to revive a failing business, ultimately harming employees of failing businesses. It also highlights the infirmity of the forfeiture doctrine, and why it should never apply under any circumstances. This Court should grant *certiorari* and reverse the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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